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Nos. 74-1477 and 74-1478

In the Supreme Court of the United States

OCTOBER TERM, 1975

FAST MOTOR SERVICE, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

FAST MOTOR SERVICE, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals from the final judgment[1] of a three-judge district court (No. 74-1477, J.S. App. D; No. 74-1478, J.S. App. E) affirming two decisions and orders of the Interstate Commerce Commission (No. 74-1477, J.S. Apps. A-C, 1a-40a; No. 74-1478, J.S. Apps. A-D, 1a-64a) which denied appellant's applications for contract carrier permits pursuant to Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b). Section 209(b) provides that in determining whether a contract carrier permit would be in the public interest "the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

In No. 74-1477, appellant sought authority to transport containers and related products manufactured by Continental Can Company between points in twenty-three central and eastern states under a yet-to-be-concluded contract. After a hearing before an administrative law judge, at which twenty-two carriers presented evidence in opposition, the judge concluded that appellant had failed to "establish the essential elements of a need for service" (No. 74-1477, J.S. App. A, 30a). The judge further found that "[i]n the absence of establishing what the shipper's actual need for service is, there is no way of determining whether the proposed

[1]No separate judgment was entered. The recitation of judgment appears on the last page of the decision (No. 74-1477, J.S. App. D, 49a; No. 74-1478, J.S. App. E, 73a).

operation is better tailored to meet the shipper's requirements than is [the service] offered by protestants" (*ibid.*). The administrative law judge also noted a lack of probative evidence with respect to the feasibility of appellant's performing the service (*id.* at 30-31a), found that granting the application could adversely affect other carriers and that denial will not have a material adverse effect on appellant or Continental Can (*id.* at 31a), and concluded that Continental Can's "requirements were not so marked by change as to make the criterion a significant factor" (*id.* at 32a). Adopting the findings of the administrative law judge, the Commission affirmed (*id.* at 36a-37a).

In No. 74-1478, appellant filed a similar application seeking authority to transport like commodities for the same shipper between points in thirty-seven south, central and eastern states, also under a yet-to-be-concluded contract. The Commission found[2] that appellant's presentation contained essentially the same defects as those described in the companion case (No. 74-1478, J.S. App. C, 61a).[3] The Commission noted particularly

[2]After a hearing at which twenty-six carriers opposed the application, a second administrative law judge concluded that appellant's application should be denied because the proposed service did not constitute contract carriage, but rather would have appellant operating as a common carrier (No. 74-1478, J.S. App. A, 44a-55a).

[3]The Commission found that granting the application would result in "diversion of traffic presently handled" by the protesting carriers and "would adversely affect their existing operations," while a denial "would not adversely affect applicant" and would have "little, if any, adverse effect" on Continental Can (No. 74-1478, J.S. App. C, 61a).

"that little probative evidence was presented to establish what specific service is needed, and as to just how, where, and to what extent the proposed operation would be used * * *; and that applicant has not shown that its proposal is better tailored to meet the shipper's requirements than that offered by protestants" (*ibid.*).

Appellant sued in the district court to set aside the Commission's orders denying its applications. In sustaining both orders (No. 74-1477, J.S. App. D; No. 74-1478, J.S. App. E), the three-judge court, with one judge dissenting, held that the Commission had properly given controlling weight to appellant's failure to make a sufficient showing with respect to the "nature of the service proposed" by the application. Observing that "[i]n effect applicant and the shipper are seeking the issuance of a permit, after which they will then determine where and when there is a need for service and the extent to which it will be employed," the court concluded that "[t]his is contrary to the regulatory scheme" and would not be " 'consistent with the public interest and the national transportation policy' as required by Section 209(b)" (No. 74-1477, J.S. App. D, 45a; No. 74-1478, J.S. App. E, 69a).

Although the district court concluded that the Commission had given controlling weight to appellant's failure to demonstrate the "nature of the service" (No. 74-1478, J.S. App. E, 67a-68a), it also examined the evidence with respect to the other statutory factors and found the Commission's findings to be supported by substantial evidence (*id.* at 67a-73a).[4]

[4]The court noted in No. 74-1477 that appellant's failure to make an adequate showing with respect to the service to be provided made it difficult to evaluate adverse effects upon other carriers and that the Commission did not give great weight to this factor, but the court did not re-evaluate the evidence on this point (No. 74-1477, J.S. App. D, 45a-46a; No. 74-1478, J.S. App. E, 69a-70a).

ARGUMENT

This appeal involves the application of settled legal principles to the facts of this particular case and presents no issue warranting plenary consideration by this Court.

1. The decision below is consistent with this Court's decision in *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, which established the procedures to be followed in applying the criteria mandated by Section 209(b). The Court there held (*id.* at 90):

> The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show they have the ability as well as the willingness to meet that specialized need. If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.

That procedure places the initial burden on the applicant to describe the "nature of the service" with sufficient precision to enable the Commission to evaluate the statutory factors. The Commission must have sufficient information to determine whether the proposed service is in fact tailored to the distinct needs of a particular shipper, to evaluate the protestants' ability to provide comparable service, and to measure the relative hardships to the applicant, the shipper, and other car-

riers that are likely to result from the grant or denial of the application. The Commission accordingly requires the applicant to provide considerable detail with respect to the nature of the proposed service.[5]

The Commission found in this case that this appellant did not provide a sufficiently detailed description of the nature of the service to be provided to satisfy its initial burden. The district court reviewed the record and concluded that the Commission's determination was supported by substantial evidence, and that the Commission acted rationally in giving controlling weight to this deficiency.

The district court's evaluation of the record is correct and a further reevaluation of the sufficiency of the "nature-of-the-service" evidence by this Court is unnecessary.

2. Appellant also disputes Commission findings in No. 74-1478 with respect to other statutory factors, particularly the Commission's characterization of the showing with respect to number of shippers as "weak" rather than "strong." The district court concluded that the Commission's characterization "is the correct one" (No. 74-1478, J.S. App. E, 67a) and properly observed that it is difficult "to see how the satisfaction of * * * [only one particular] criterion could be found to overcome plaintiff's failure to satisfy other criteria" (*id.* at

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[5]In *Midwestern Express, Inc., Contract Carrier Application*, 112 M.C.C. 624, 631, for example, Commission Review Board No. 3 held:

> [M]erely a *pro forma* showing is not enough. We believe applicant and shipper must establish with particularity the special transportation requirements of the latter's business, and describe in detail just how, where, and to what extent the proposed service will be used, to the end of providing a sound basis for the conclusion that shipper has specialized or distinct needs, to which applicant's operation is better tailored than the service of protesting carriers.

68a). The court also concluded that the Commission's findings and conclusion with respect to the other factors "are supported by substantial evidence in the record * * * " (*id.* at 73a). The sufficiency of the evidence with respect to subsidiary factors that were not determinative does not warrant plenary consideration.[6]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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[6]Appellant claims that the Commission did not adequately articulate its reasoning (No. 74-1478, J.S. 21, 24). But, in view of the indefinite nature of appellant's proposed service, the Commission provided a sufficient "reasoned basis" for its decision. *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285.